**KHIDMAT SAUJANA (M) SDN. BHD.**

**v.**

**LEMBAGA KEMAJUAN JOHOR TENGGARA**

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[CIVIL SUIT NO. 22-292 OF 1991]
18 AUGUST 1992

***CIVIL PROCEDURE:*** *Appeal - Application to file notice of appeal out of time - Whether any reasonable explanation for the delay - Whether any merits in the appeal - Rules of the High Court 1980 O. 56 r. 1(3).*

On 19 December 1991, plaintiffs had obtained judgment in default of appearance against the defendants. The defendants applied to set it aside but the Senior Assistant Registrar had disallowed their application on 17 February 1992 stating that the defendants were at liberty to file a fresh application after it had obtained leave of the Court.

Instead of appealing against the judgment order, the defendants filed a fresh application to set aside the default judgment on 18 March 1992. This was disallowed by the Senior Assistant Registrar on 27 April 1992.

The defendants then appealed against the decision dated 27 April 1992 but subsequently withdrew it. However, the defendants applied for leave to file notice of appeal out of time against the decision of the Senior Assistant Registrar dated 17 February 1992.

**Held:**

**[1]** The defendants' application was made under O. 56 r. 1(3) of the High Court Rules and the governing principle for leave was that there must be reasonable explanation for the delay and that there were merits in the proposed appeal. From the events that has taken place, there was no reasonable excuse forwarded by the defendants to offer reasonable explanation in granting this application. The defendants could have appealed against the judgment order well within time but chose to adopt inappropriate course of action.

**[2]** The defendants being represented by solicitors should be fully aware that if they are dissatisfied with the decision of the Senior Assistant Registrar, they should have filed an appeal against the decision. Instead they accepted the decision and proceeded to file afresh another application to set aside without complying with the judgment order of the Senior Assistant Registrar. Whether the judgment order was made correctly or not, it stands good as a judgment order until it was set aside.

**[3]** The supporting affidavit did not state the merits in the proposed appeal. As this was one of the essential grounds for consideration the absence of it did not warrant the defendants' application to be granted.

*[Application dismissed with costs.]*

**Legislation referred to:**
Rules of the High Court 1980 O. 56 r. 1(3)

*For the applicant/defendants - Zakaria bin Embi; M/s. Jalil Mohamed & Partners*
*For the respondent/plaintiffs - Ibrahim Hashim; M/s. Hasssan Ibrahim & Co.*

**JUDGMENT**

**James Foong J:**

This is an application (encl. 63) by the defendants for leave to file notice of appeal out of time against the decision of the Senior Assistant Registrar dated 17 February 1992.

On 19 December 1991 interlocutory judgment was entered against the defendants by the plaintiffs due to the default of the defendants in entering appearance. The defendants applied to set it aside and on 17 February 1992, the Senior Assistant Registrar disallowed this defendants' application. In the judgment order of the Senior Assistant Registrar dated 17 February 1992 (encl. 33) it is stated that besides the application to set aside being dismissed it is ordered that the defendants are at liberty to file a fresh application after it has obtained leave of the Court.

On 18 March 1992 instead of appealing against the Senior Assistant Registrar's judgment order (encl. 33), the defendants' solicitors filed a fresh application to set aside the default judgment entered against the defendants. This was again heard and disallowed by the Senior Assistant Registrar on 27 April 1992. The defendants then appealed (encl. 49) to this Court against the decision of the Senior Assistant Registrar dated 27 April 1992. This appeal was subsequently withdrawn.

The defendants' application is made under O. 56 r. 1(3) of the High Court Rules 1980. The governing principles for leave on such matters are clearly set out in a number of decided cases of which I need not mention. These are mainly as follows:

(1) that there must be reasonable explanation for the delay and

(2) whether there are merits in the proposed appeal.

In the affidavit of the defendants' solicitors (encl. 64), he implied that this application was made because he believed that this is a more suitable approach rather than the steps taken by the defendants as mentioned earlier by me. I find that this explanation is unacceptable since, the defendants being represented by solicitors should be fully aware that if they are dissatisfied with the decision of the Senior Assistant Registrar, they should have filed an appeal against her decision. Instead they accepted her decision and proceeded to file afresh another application to set aside without complying with the judgment order of the Senior Assistant Registrar. Whether the judgment order of the Senior Assistant Registrar (encl. 33) is made correctly or not, it stands good as a judgment order until it is set aside. This matter did not stop here when this defendants' second application to set aside came up for hearing; it was once again dismissed by the Senior Assistant Registrar. The defendants then appealed against the second decision of the Senior Assistant Registrar. This appeal (encl. 49) was only withdrawn when it came up for hearing with today's application.

From the events that has taken place, I find no reasonable excuse forwarded by the defendants to offer reasonable explanation in granting this application. Instead what has transpired seems to indicate that the defendants have selected not only to adopt the judgment order (encl. 33) but also proceeded with various subsequent actions, in pursuant to this judgment order. Now after realising the various inappropriate steps so taken, the defendants are approaching this Court with this application for extension of time to file notice of appeal. The delay has caused them 160 days out of time. The defendants could have appealed against the judgment order well within time but by choosing to adopt other inappropriate course of action cannot return to offer an explanation that they have acted wrongly and expect this Court to entertain such application on such reasons.

Further, after perusing the affidavit (encl. 56) filed in support of this defendants' application I find no mention about the merits in the proposed appeal. As this is one of the essential circumstances for consideration, the absence of it does not warrant the defendants' application to be granted.

Therefore together with my reasons stated aforesaid I hereby dismiss the defendants' application (encl. 63) with costs.

Also found in [1992] 4 CLJ 2011